

Letter of Findings: 04-20130491
Sales Tax
For the Years 2010, 2011, and 2012

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

ISSUES

I. Sales and Use Tax - Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-1-18; IC § 6-2.5-1-23; IC § 6-2.5-5; IC § 6-2.5-5-18; IC § 6-2.5-8-8; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Stump v. Indiana Dept. of State Revenue, 777 N.E.2d 799 (Ind. Tax Ct. 2002); [45 IAC 2.2-5-27](#); [45 IAC 2.2-5-28](#); Sales Tax Information Bulletin 48 (August 2008).

Taxpayer protests the Department's assessment of additional sales tax.

II. Tax Administration - Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana company, operating several retail stores in Indiana. Taxpayer sells furniture, including adjustable beds, adjustable chairs, mattresses, box springs, pillows, sheets, bed frames, and household furniture, to customers in Indiana and outside of Indiana.

In 2013, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records for the tax years 2010, 2011, and 2012. Pursuant to the audit, the Department determined that Taxpayer sold various adjustable beds (the "beds at issue") without collecting sales tax or obtaining necessary supporting documentation, which included properly executed exemption certificates or prescriptions, from its customers who claimed the purchases are exempt pursuant to statutory exemptions. The Department's audit further found that Taxpayer purchased tangible personal property, such as gallons of paint, tags, light bulbs, and magazine subscriptions, to be used in the course of its business, without paying sales tax or self-assessing use tax. As a result, the Department's audit assessed additional sales tax, use tax, penalty, and interest.

Taxpayer protests the assessments of additional sales tax on its sales of the beds at issue. Prior to an administrative hearing, Taxpayer submitted additional documentation, including prescriptions from various doctors to support its protest. Upon review, the Department determined that one transaction was properly rescinded and thus agreed to remove the assessment of that specific line item from the audit report.

Taxpayer continues to protest the remaining sales tax assessment concerning the beds at issue and the negligent penalty. A hearing was conducted by phone. This Letter of Findings ensues and addresses both issues. Further facts will be supplied as necessary.

I. Sales and Use Tax - Imposition.

DISCUSSION

The Department assessed additional sales tax on the ground that Taxpayer sold the beds at issue to its Indiana

customers without collecting sales tax or obtaining necessary supporting documentation. Taxpayer argues that it was not responsible for the additional sales tax because its customers claimed that their purchases of the beds at issue were exempt pursuant to IC § 5-2.5-5-18.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires tangible person property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Additionally, the purchaser "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state." *Id.* The retail merchant may be relieved from the statutory duty to collect and remit the sales/use tax if, at the time of the transaction, the retail merchant obtains necessary supporting documentation, which demonstrates the purchaser is entitled to a statutory exemption. See IC § 6-2.5-8-8; IC § 6-8.1-5-4.

An exemption from the sales tax is outlined in IC § 6-2.5-5. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (internal citations omitted). In applying any tax exemption, "[t]he general rule is that tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

The relevant exemption in this instance is IC § 6-2.5-5-18. IC § 6-2.5-5-18(a), which is applicable for the tax years at issue, in relevant part, states that "[s]ales . . . of durable medical equipment . . . are exempt from the state gross retail tax, if the sales are prescribed by a person licensed to issue the prescription."

IC § 6-2.5-1-18 provides:

(a) "Durable medical equipment" means equipment, including repair and replacement parts for the equipment, that:

- (1) can withstand repeated use;
- (2) is primarily and customarily used to serve a medical purpose;
- (3) generally is not useful to a person in the absence of illness or injury; and
- (4) is not worn in or on the body.

The term does not include mobility enhancing equipment.

(b) As used in this section, "repair and replacement parts" includes all components or attachments used in conjunction with durable medical equipment.

Additionally, [45 IAC 2.2-5-27\(a\)](#) explains that "'person licensed to issue a prescription' shall include only those persons licensed or registered to fit and/or dispense such devices." [45 IAC 2.2-5-27\(b\)](#) defines "prescribed" as "the issuance by a person [under [45 IAC 2.2-5-27\(a\)](#)] of a certification in writing that the use of the medical equipment supplies and devices is necessary to the purchaser in order to correct or to alleviate a condition brought about by injury to, malfunction of, or removal of a portion of the purchaser's body." "Prescription" means "an order, a formula, or a recipe issued in any form of oral, written, electronic, or other means of transmission by a licensed practitioner authorized by Indiana law." IC § 6-2.5-1-23.

Finally, in order to be exempt under IC § 6-2.5-5-18, the use of the medical equipment must be "**directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body.**" [45 IAC 2.2-5-28\(h\)](#) (**Emphasis added**); see also *Stump v. Indiana Dept. of State Revenue*, 777 N.E.2d 799, 802 (Ind. Tax Ct. 2002). For the purpose of [45 IAC 2.2-5-28\(h\)](#), "directly," means "without any intervening agency or

instrumentality or determining influence: without any intermediate step." Stump, 777 N.E.2d at 802 (internal citation omitted).

The Department's Sales Tax Information Bulletin 48 (August 2008), 20080827 Ind. Reg. 045080661NRA, further outlines the application of this exemption to medical profession and also provides some useful guidance as to sales to patients, which in relevant part states as follows:

II. Sales of Durable Medical Equipment, Devices, Drugs, and other Supplies

A. Sales to Patients:

The following sales . . . of durable medical equipment, devices, drugs, and other supplies are exempt from Indiana Sales or Use Tax provided such durable medical equipment, devices, drugs, and other supplies are prescribed by a licensed practitioner:

- (1) Sales of artificial limbs;
- (2) Sales of orthopedic devices designed to correct deformities and/or injuries to the human skeletal system including the spine, joint, bones, cartilages, ligaments, and muscles;
- (3) Sales of dental prosthetic devices used for the replacement of missing teeth such as bridges and artificial dentures;
- (4) Sales of corrective eyeglass and contact lenses;
- (5) Sales of drugs by a registered pharmacist or licensed practitioner;
- (6) Sales of durable **medical equipment** that can stand repeated use, **is primarily used to serve a medical purpose, is generally not useful to a person in the absence of an illness or injury, and is not worn in or on the body, and that is directly required to correct or alleviate injury, to malfunction of, or removal of a portion of the human body;** and
- (7) Sales of repair and replacement parts for the above durable medical equipment.

In addition, the following sales to patients are exempt:

- (1) Sales of hearing aids worn on the human body designed for aiding, improving, or correcting defective human hearing if fitted or dispensed by a person licensed or registered for that purposes;
- (2) Sales of colostomy and ileostomy bags and equipment;
- (3) Sales of insulin, oxygen, blood, or blood plasma if purchased for medical purposes; and
- (4) Sales of syringes or other instruments used to administer insulin.

(Emphasis added).

In this case, Taxpayer is a retail merchant selling furniture to its customers. Taxpayer sold the beds at issue without collecting the sales tax or obtaining necessary supporting documentation at the time of the sales. The Department thus assessed sales tax pursuant to the audit. Taxpayer, to the contrary, asserts that its customers, who purchased the beds at issue, claimed that their purchases were exempt under IC § 6-2.5-5-18 and thus it is not responsible for the sales tax.

Upon review, however, Taxpayer's reliance on IC § 6-2.5-5-18 is misplaced. As mentioned above, to qualify for this exemption, the beds at issue must meet the statutory definition of "durable medical equipment." That is, the beds at issue must (1) withstand repeated use, (2) be primarily and customarily used to serve a medical purpose, (3) generally not be useful to a person in the absence of illness or injury, and (4) not be worn in or on the body. IC § 6-2.5-1-18(a). Additionally, the beds at issue must be directly required to correct or alleviate injury to malfunction of, or removal of a portion of the human body. [45 IAC 2.2-5-28\(h\)](#); Stump, 777 N.E.2d at 802. Taxpayer provides no documentation demonstrating that the beds at issue qualify for the durable medical equipment under IC § 6-2.5-1-18(a). Specifically, Taxpayer provides no documentation to demonstrate the beds at issue are "primarily and customarily used to serve a medical purpose" and generally are "not useful to a person in the absence of illness or injury." Id. Additionally, Taxpayer's documentation also fails to demonstrate that the beds at issue are "directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body." [45 IAC 2.2-5-28\(h\)](#); Sales Tax Information Bulletin 48.

Even if, assuming that the beds at issue qualify as the "durable medical equipment" under IC § 6-2.5-1-18(a), Taxpayer's supporting documentation fails to demonstrate that the sales of the beds at issue were sold pursuant to "prescriptions" at the time of the transactions as statutorily required. IC § 6-2.5-5-18. Taxpayer provided documents which were dated in 2013 but the retail transactions in question occurred in 2010, 2011, and 2012.

Also, Taxpayer provided other supporting documents which fail to meet the requirement as "prescription" under IC § 6-2.5-1-23.

In this instance, the Department's audit noted that Taxpayer sells furniture, tangible personal property, to its customers. Taxpayer thus is a retail merchant and should have collected and remitted the sales tax on its sales. Taxpayer did not do so. Nor did Taxpayer provide the necessary supporting documentation to properly claim exemptions, which it should have collected from its customers, to the Department's auditor during the audit. The auditor was therefore unable to verify whether certain sales were exempt from the sales tax.

There is no question that Taxpayer entered into retail transactions for which - absent an exemption - Taxpayer was required to collect sales tax. Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the supporting documentation, including the properly executed exemption certificate or prescription, should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden demonstrating that the Department's assessment is not correct.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration - Negligence Penalty.

DISCUSSION

The Department's audit imposed a ten percent negligence penalty for the tax years in question. Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department[.]

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this instance, Taxpayer requested that the Department abate the negligence penalty. However, Taxpayer did not provide sufficient documentation to demonstrate that the negligence penalty should be abated.

FINDING

Taxpayer's protest of the imposition of negligence penalty is denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest of both Issue I and Issue II is denied.

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